

CHAPTER 4

FAMILY LAW

A. REQUISITES FOR MARRIAGE

If you are over the age of 18 and mentally capable of consenting to marriage, you may marry. If you are between the ages of 16 and 18, you must have the written consent of a parent or guardian and proof of your age before a marriage license will be issued to you. Minors under the age of 16 cannot marry except by written consent of a parent or guardian and by an order of the court. Married minors are considered emancipated and can handle their own business affairs, enter into contracts, sue and be sued and assume the other responsibilities of adulthood.

B. NAME

Idaho has no statute requiring the woman to assume her husband's name when she marries, although this is common practice. You may use any name you choose as long as it is not used for fraudulent purposes. Historically, the children of a marriage have been given the father's last name, but it is permissible to use the mother's name, a hyphenated last name or a totally different last name.

If you change your name upon marriage and later divorce, you can have your former name formally restored in the divorce decree or through a separate legal proceeding at a later time.

You may legally change your name without going through a court proceeding. Yet, because of difficulties sometimes encountered in getting others to accept a name different from the name on your birth certificate, marriage license, divorce decree or court order, you may wish to change your name through a court proceeding. Whatever name you use, it is best to use that name consistently.

C. RESIDENCE

The place of residence is the decision of both parties to marriage. In 1974, the Idaho legislature repealed the statute that designated the husband the head of the family, which had allowed him to choose the place of living.

D. ANTENUPTIAL AGREEMENTS - SOMETIMES REFERRED TO AS PRENUPTIAL AGREEMENTS

An ante nuptial agreement is a written agreement between a husband and wife which is entered into before they marry and usually states how the property is to be divided and how much maintenance, if any, is to be paid if the parties ever divorce. Antenuptial agreements are recognized in Idaho. If they are fair and entered into with both parties disclosing everything they need to without one party trying to coerce or defraud the other, antenuptial agreements can be a good way to take care of practical matters before the marriage.

It is important, however, that each party understands the agreement completely before signing it and that each has her or his own attorney. Examples of antenuptial agreements can be found in books available at a public library.

E. COMMON LAW MARRIAGE

Idaho used to be one of a small number of states, which did not require that a marriage be solemnized by a person authorized to perform marriage ceremonies. A marriage entered into without such solemnization is called a common law marriage. After January 1, 1996, new common law marriages are no longer recognized in Idaho. Common law marriages entered into before that date may still be recognized.

To have formed a common law marriage, before January 1, 1996, both parties must have consented to be married, held themselves out in the community as husband and wife and assumed marital rights, duties and obligations. No minimum time of living together was required or necessary to form a common law marriage.

The requisites for marriage discussed in Part A of this chapter, except for the requirement of a marriage license, apply to common law marriage. A common law marriage carries with it all the rights and responsibilities of a ceremonial marriage, including inheritance and community property rights.

F. MARRIAGES RECOGNIZED IN IDAHO

Idaho recognizes marriages entered into out of the state unless the marriage violates the public policy of the state. Public policy does not recognize same sex marriages or marriages entered into out-of-state or in a foreign country with the intent to get around the marriage laws of Idaho.

G. UNMARRIED PARENTS

1. LEGITIMACY

A man is presumed to be the father of a child if he was married to the child's mother either at the time of conception of the child or after the child was born. If the mother of the child or the "presumed father" believes that the "presumed father" is not the child's biological father, this presumption may be rebutted by clear and convincing evidence in a court of law.

"Clear and convincing evidence" usually means that paternity tests on mother, child and the presumed father have proved that the man could not have fathered the child. When rebutted, presumption of legitimacy of a child born during wedlock is overcome by: (1) genetic tests which show that a husband is not the father of the child; or (2) an affidavit of nonpaternity signed by the natural mother and her husband and an affidavit signed by the natural mother and the natural father.

2. PATERNITY

If the mother of the child was not married at the time of the child's birth, the name of the child's father cannot be entered on the child's birth certificate without the written notarized consent of both the mother and the person to be named as the father. However, even if the mother and the person named as the father do sign the consent, paternity has not been legally established in Idaho in any of the following ways:

a. Subsequent marriage of the parents - If the father of a child born out of wedlock marries the child's mother, the child is legitimized. If the child was born in Idaho, the parents can obtain a new birth certificate listing the child's father on the certificate by filing an application for the new certificate, along with a copy of the marriage license, with the Bureau of Vital Statistics.

b Adoption by father of illegitimate child - If the father of a child born to an unmarried woman publicly acknowledges the child as his own and receives the child in his home and treats the child as if it were a legitimate child, the father has adopted the child and it is considered to be legitimate from the time of its birth. If the child's parents do not intend to marry each other, they may voluntarily obtain an Order of Filiation (Paternity) through the court to obtain a legal document formally establishing the child's paternity.

c. Paternity action through the court - The parent of a child born out of wedlock who wants to establish the paternity of her/his child can do so either through a private attorney or through the local Department of Health and Welfare Office. The department can bring the action itself and the parent of the child is required to cooperate in the department's action as a condition of eligibility for benefits. The party bringing the action will file a complaint requesting that the court establish the child's paternity and set a support award. The complaint may also request reimbursement for birth expenses and child support provided to the child prior to the court's order. If the man admits paternity, the action can be completed very rapidly. If the man denies paternity, or is uncertain that he is the father, the court can order the mother, child and presumed father to submit to paternity testing. Paternity testing of mother, child and presumed father can range from \$225 up to 1,000. If paternity tests prove that the man could be the child's father, the court will usually order that he pay the costs of the paternity testing. If the paternity tests prove that the man could not be the child's father, the mother (or the State of Idaho) is usually ordered to pay the costs of the testing. Based upon the results of testing and other evidence, the father can be ordered to provide child support and medical insurance for the child until the child reaches 18, unless the child is continuing his/her education, then the father can be responsible to pay child support up to the age of 19. Once paternity is established, the father of the child can seek visitation rights or custody of the child.

A father may voluntarily acknowledge paternity, by jointly signing an acknowledgment of parentage with the mother and filing that document with the court. It is evidence of paternity. An acknowledgment signed after July 1, 1996 may be rescinded by any party to the acknowledgment the earlier of: a) six months, or less if federal law or regulation dictates, from the date of execution, or b) the date of a proceeding relating to the child, including a child support hearing.

In most cases, it is in the best interests of a child born out of wedlock to have paternity established. Some of the benefits of establishing paternity are:

1. The father can be ordered to provide child support and medical insurance for the child until the child reaches 19 or graduation from high school;

2. The child will be eligible for Social Security benefits, insurance and worker's compensation if the father becomes disabled or dies, whichever is sooner;
3. The child can inherit from the father's estate;
4. The child will be able to sue in case of the father's death due to negligence of a third party;
5. The child will have the opportunity to establish a relationship with the father;
6. If the mother becomes disabled, imprisoned, or dies, the father may provide care and support for the child;
7. The father can be ordered to pay for funeral expenses if the child dies;
8. The father may also be ordered to pay for birth expenses and expenses incurred for support of the child prior to the establishment of paternity;
9. Knowledge of the father's family medical history is often important to the child.

H. RIGHTS OF A PUTATIVE FATHER

An individual who claims to be the father of a child born out of wedlock may file a notice of his claim with the Idaho Bureau of Vital Statistics. The claim of paternity may be filed before the child is born and must be registered before any termination proceedings or placement of the child with an adoption agency.

If a notice of paternity has been filed the individual who filed his claim must be notified and given an opportunity to be heard before the child he claims to have fathered can be adopted.

Until the paternity of a child born out of wedlock has been legally established, the putative father has no other rights regarding the child. Once paternity is legally established the father is entitled to assume parental rights, duties and responsibilities as established by the court.

I. FAMILY FINANCIAL RESPONSIBILITY

In Idaho, a husband and wife have a mutual obligation of financial support. This means that each spouse is responsible for providing the necessities of life for the other. Necessities of life include food and lodging. Parents also have a legal duty to financially support their natural and adopted children who are under the age of 18. This responsibility attaches to both parents. If parents are divorced, each parent continues to have a legal duty to provide support for any children.

J. CHILD PROTECTION ACTIONS

The Child Protective Act (CPA) is a body of law which addresses child abuse, abandonment and neglect. Each child that comes under this act shall receive the care, guidance and control that will promote that child's welfare and the best interest of the State of Idaho.

The CPA seeks to join the efforts of state and local public agencies and private organizations to serve the family unit and to take such action as may be necessary to prevent the abuse, neglect or abandonment of children. These efforts also include the development of interagency multi-disciplinary teams by January 1997 for investigation of abuse and neglect referrals within each county.

Under the CPA, police officers who believe that a child is in imminent danger have the right to take custody of that child. The family of that child has a right to a hearing within 48 hours (shelter care hearing) where the court will decide, after being presented with evidence, the best placement of the child pending an adjudicatory hearing. An adjudicatory hearing is a court proceeding where all parties present their evidence and then the court decides who will have legal and physical custody of the child.

Several options are available in the resolution of an action under the CPA. An authorized agency, most often the Department of Health and Welfare, may obtain legal custody of the child. Legal custody means the Department of Health and Welfare has responsibility of the child. The child may be placed with her/his parents under certain conditions or may be placed in foster care for a time. Or, an agreement may be reached whereby the family will attend counseling or parenting classes in exchange for having the child returned to the home with Health and Welfare monitoring the child's care.

Under the CPA, both parents have the right to an attorney. If the case is complex, if an attorney is necessary to protect the parents' interests and if those interests are not adequately represented by another party, the court may appoint an attorney for a parent. A guardian ad litem is automatically appointed for any child involved in this act. Additionally, an attorney may be appointed for the guardian ad litem. The guardian ad litem's role is to represent to the court the best interests of the child.

Please also see Chapter 10 Section C, #2: Reporting of Child Abuse, Abandonment or Neglect.

K. TERMINATION OF PARENTAL RIGHTS

Parental rights can only be terminated under certain conditions. These conditions are as follows:

1. A parent has abandoned, neglected or abused her/his child. Sometimes, under these circumstances the Department of Health and Welfare will obtain legal custody of the child under the Child Protective Act (See Section I). If attempts at reuniting the family are unsuccessful then termination of parental rights may be pursued.
2. The parent is unable to discharge parental responsibilities because of mental illness and there are reasonable grounds to believe the condition will continue for a prolonged indeterminate period and will be injurious to the health, morals or well being of the child.
3. Termination is found to be in the best interests of the parent and child and a petition for termination has been filed by the parent, attorney for parent, authorized agency or an interested party.
4. A consent to termination witnessed by a judge and a petition for adoption by the persons seeking to adopt are filed with the court.
5. A parent's criminal act has caused the conception of the child, or the surviving parent has killed the other parent or the parent is in prison without possibility of parole. After one of these conditions has been met and the proper paperwork filed with the court, a hearing will be set. The court will hear the matter without a jury. If after the hearing the court terminates parental rights, then the parents have no legal rights over that child.

L. ADOPTIONS

Adoption is a two-part process. The written consent, witnessed by a district judge or magistrate judge, of natural parents of the child to be adopted must be obtained. If one or both parents do not consent in writing, witnessed by a judge, a court proceeding for termination of parental rights is required. Although this is a two-part process, the petition for termination of parental rights and the petition for adoption may be jointly filed. Similarly, the hearings on both petitions may be conducted on the same day. If a parent cannot afford an attorney and wants one, the court will appoint an attorney before a hearing to terminate parental rights.

The adoption petition contains information about the person being adopted and the individual(s) requesting the adoption. Unless a stepparent is requesting the adoption of a stepchild, a home study must be completed by Health and Welfare or a licensed children's adoption agency and provided to the judge for review. The cost of the home study varies and must usually be paid in advance.

Adoption hearings are closed, which means that only the judge, the judge's clerk and the people directly involved may attend the hearing. After considering the evidence presented and determining that the adoption is appropriate, the court will have the adopting parent(s) sign an adoption agreement accepting the parental responsibilities for the child. The judge then issues an order of adoption. Because there is no waiting period in Idaho, the adoption is filed when the judge signs the adoption order. The court then "seals" the file, which means the file can be opened only by court order.

After the court signs the order of adoption, a certificate of adoption is completed and a new birth certificate is issued for the child. Procedures may differ for an out-of-state adoption and an attorney should be consulted.

In 1996, the Idaho Legislature added a section governing international adoption of children. In order for a child to be adopted when entering the United States, an adoption petition should be filed. Further, if the child has already been adopted under a foreign country's adoption procedures, that adoption can be recognized here by the filing of an adoption petition. The adopting parents must file a petition, which will contain information about the parents and the child. The adopting parents must certify that the child has a visa or other document allowing him or her to enter the U.S., and that a home study of the adopting parents has been conducted. That home study is attached to the adoption petition.

The adopting parents must also state that under their belief, the child's biological parents are residents of a foreign country, and that the adoption is in the child's best interests. At the hearing for the international adoption, the judge will determine whether the adoption is in the best interests of the child, and if it is, the judge will enter an adoption decree.

After that time, the child is treated as the parent's own lawful child. If the child has entered the country by permission of the State Department or I.N.S., for the purpose of being adopted in this country, the permission of the biological parents is not needed for the adoption.

M. JUVENILES

The Juvenile Corrections Act, passed by the Idaho Legislature in 1995, covers the treatment of juveniles who have committed a crime and establishes the Idaho Department of Juvenile Corrections. The juvenile corrections system is based on the principles of accountability, community protection and competency development. Parents of other legal guardians of juvenile offenders must also participate through counseling or treatment to promote positive parenting skills and an understanding of the family's role in the juvenile's behavior. Parents or legal guardians are also held accountable, where appropriate, through payment of detention costs and restitution to victims of the juvenile's delinquent acts. A juvenile is anyone under the age of 18.

1. JUVENILE OFFENDERS

a. STATUS OFFENDERS

Status offenses include runaway, curfew violations and truancies. These are acts which if committed by an adult would not constitute a crime. Detention is not available for punishment of status offenses unless three status offenses have been committed within a 12-month period. Detention often is used for habitual runaways to insure the juvenile's presence at pending juvenile court proceedings.

b. ADULT CRIMES

Any juvenile who commits rape, murder, attempted murder, 1 st degree arson, robbery, mayhem, forcible sexual penetration by use of a foreign object, or forcible infamous crimes against nature, or assault or battery with intent to commit any of these crimes, is automatically treated by the court system as an adult. The juvenile offender is housed in the county jail and stands trial by jury. Once a juvenile offender goes to adult court she/he will thereafter be dealt with in the criminal court system as an adult.

c. MISDEMEANOR AND FELONY OFFENSES

A juvenile who either pleads guilty to, or is found guilty beyond a reasonable doubt of committing a crime that would be either a misdemeanor or a felony if committed by an adult, will be sentenced to a maximum 90-day detention term if found guilty of a misdemeanor or a 180-day detention term if found guilty of a felony.

Some or all of the detention time can be suspended and the juvenile offender placed on probation for a term of 3 years or less. If the case is very serious, the juvenile offender can be committed to the custody of the Department of Juvenile Corrections for an indeterminate time up to the juvenile offender's 19th birthday.

The presiding judge has a great deal of latitude in the sentencing of juvenile offenders. After reviewing a report submitted by the county probation office, parents' recommendations and any other appropriate information, the judge can structure probation to assure that the community is protected and that the juvenile is held accountable and given the opportunity to develop needed skills to succeed without further law violations. The terms of probation often include community service, classes, counseling, and apology to the victim and restitution.

d. CONSTITUTIONAL RIGHTS

Juvenile proceedings are less formal than adult proceedings. A juvenile has the same basic constitutional rights as an adult charged with a crime, including the right to remain silent, to be represented by an attorney and to have one appointed if she/he cannot afford one, to testify on her/his own behalf and to cross-examine witnesses.

2. PARENTAL RESPONSIBILITY

Parents can be required to participate in counseling, restitution or skill-building classes. They are also responsible for the cost of the care and treatment of juvenile offenders. Restitution for damages to victims can be in any amount determined by the court, and parents as well as the juvenile, can be ordered to pay restitution. In 1996 the Legislature passed the "Parent Responsibility Act," authorizing cities and counties to enact and enforce ordinances that define and set penalties for failure to supervise a child.

3. EMANCIPATION OF MINORS

Idaho does not provide for the emancipation of minors, except through marriage. Some states do authorize a court procedure which results in a minor child being totally responsible for her/himself legally and relieving parent(s) of legal responsibility. Because the laws of the State of Idaho do not recognize emancipation of minors, parents are legally responsible for their unmarried minor children.